

MEMORANDUM

TO: Michael Massey, Esq.
Office of the Regional Counsel
U.S. Environmental Protection Agency, Region IX

FROM: Beveridge & Diamond, P.C.
on behalf of the Yosemite Creek PRP Group

RE: Yosemite Creek Site - Comments on EPA's template Administrative
Settlement Agreement and Order on Consent for Removal Action

This memorandum summarizes the Yosemite Creek PRP Group's (the "Group") preliminary comments and issues identified in the template Administrative Settlement Agreement and Order on Consent for Removal Action ("Settlement Agreement" or "AOC") provided by the U.S. Environmental Protection Agency ("EPA"). The template AOC provided by EPA was an AOC in the matter of Greka Oil and Gas, Inc., located in Santa Maria, California with an effective date of June, 16, 2008 ("Template AOC"). Enclosed with this memo is a redlined version of the Template AOC that incorporates many of these comments. This memo and the redlined AOC focus on potential terms and issues for negotiation with EPA should the Group and EPA enter into such substantive negotiations. It is not intended as a comprehensive proposed revision of the Template AOC nor a conclusion that a AOC of this kind is appropriate here. Note also that placeholders have been inserted for certain sections for which we do not have preliminary comments at this time, such as the Findings of Fact and the Work Plan.

I. **SECTION I. Jurisdictional and General Provisions.**

- "Respondent" (§1): We will need to discuss which parties will be included within the definition of Respondent.
- "Facility" (§1): We will need to address the definition and the boundaries of the Facility. As you know from our prior discussions, this is likely to be a major issue that will impact the scope of an AOC, access issues, potential off-site disposals, and especially permitting by other agencies.

II. **SECTION III: Definitions.**

- As noted above, the definitions of "Respondent" and "Site" will need to be addressed.
- We've proposed a definition for the term, "State Statutes."

III. **SECTIONS VII & VIII: Designation of Contractor, Project Coordinator, and EPA Project Manager and Work to be Performed.**

- While most of these sections will depend upon what work is determined to be performed, we have proposed several revised deadlines that we believe to be more reasonable at this site.
- We note that ¶ 26 regarding a sampling plan likely will not be necessary in view of EPA's current plans to conduct sediment sampling in early 2009.
- We note that ¶ 30(c) may not be appropriate if Respondent does not include any Site owners.
- With respect to ¶ 32, we note that how off-Site shipments of waste materials are handled will depend upon the definitions of Respondent and of the Site.

IV. **SECTION IX: Site Access.**

We have several comments on ¶ 34, all of which relate to the fundamental question of the definitions of Respondent and of the Site.

- Property Owners: The property underlying Yosemite Creek may belong to the City and County of San Francisco ("CCSF") or it may belong to the California Department of Parks and Recreation ("DPR"). DPR began property acquisition for the Yosemite Slough Restoration Project in the early to mid-1970's. *See* California Environmental Protection Agency, Department of Toxic Substances Control Program Preliminary Endangerment Assessment Report, California Department of Parks and Recreation, Candlestick Point State Recreation Area, San Francisco, California (February 8, 1993) ("Candlestick Point PEA") at 11. This ownership may include parcels of land (APN 4832-4834) that lie underneath Yosemite Creek. *Id.* at 3 (Figure 2.1). However, the ownership status of these parcels is somewhat unclear; the Candlestick Point PEA also states that these parcels are "*projected* APN 4832 (eastern half), 4833 and 4834." *Id.* at 5 (emphasis added). The San Francisco Assessor's office has been unable to confirm that there are designated parcels underneath Yosemite Creek. Before access can be negotiated, it is necessary to determine who owns the property underlying Yosemite Creek.
- Timing: Once "Respondent" and "Site" are defined and the work to be performed determined, it likely will be more practical to link obtaining access agreements to the actual access needed and the parties involved. If more general terms are to be used, then a default period of at least thirty days should be employed instead of the ten days in the Template AOC.
- Respondent Payment for Access: The Template AOC states that "best efforts" for obtaining access agreements includes "the payment of reasonable sums of money

in consideration of access.” “Best efforts” should be replaced with “reasonable efforts.” Also, “the payment of reasonable sums of money in consideration of access” should be stricken, as the likely landowners -- CCSF and/or DPR -- have been identified by EPA as PRPs.

- EPA Assistance: The Template AOC provides that “Respondent shall reimburse EPA for all costs and attorney’s fees incurred by the United States in obtaining such access.” This provision should be stricken, as it is inconsistent with other EPA removal action AOCs, and it is particularly inappropriate in view of the factors discussed above.

V. **SECTION XI: Record Retention.**

We have two comments on ¶ 40.

- Time for Retention: The requisite retention period should be reduced from 10 years to a more reasonable 5 years.
- Procedures: For the sake of efficiency and the environment, Respondent should be able to retain records electronically.

VI. **SECTION XII: Compliance With Other Laws.**

- Permitting: As noted above, the definition of the Site or the Facility will be a major issue, as it is likely that some of the work will need to be performed outside the boundaries of Yosemite Creek itself -- e.g., the dewatering of any sediments that may be removed from the slough. Permitting for such work could become a significant issue if such dewatering resulted in contaminated water flows from the extracted sediments during the dewatering process. Several agencies, including the San Francisco Bay Conservation and Development Commission, the Regional Water Quality Control Board for the San Francisco Bay Region, and the California Department of Toxic Substances Control, among others, could be involved. Thus, language should be included in the AOC that recognizes this possibility and addresses permits and force majeure. It may be more practical to address this issue as well in more specific terms once “Respondent” and “Site” are defined and the work to be performed determined. However, as a preliminary matter, we have proposed two new subparagraphs to ¶ 42 that partially address this issue.

VII. **SECTION XV: Payment of Response Costs.**

- Past Response Costs (¶ 47.a): What is EPA’s claim for past costs at this site?
- Interest (¶ 48): Payment of interest on unpaid balances accruing from the date of the bill is not appropriate at this site.

VIII. **SECTION XVI: Dispute Resolution.**

- We've suggested a few preliminary changes to ¶¶ 50 and 51, though this section also is one that should be negotiated in more specific and practical terms once "Respondent" and "Site" have been defined and the work to be performed determined.

IX. **SECTION XVII: Force Majeure.**

- We've suggested a few preliminary changes to ¶¶ 53 and 54, though this section also is one that should be negotiated in more specific and practical terms once "Respondent" and "Site" have been defined and the work to be performed determined. Language should be developed to address the most likely of force majeure events, depending upon the work to be performed. For example, if a coffer dam is used during the remediation and a storm occurs and breaks the dam, this should be defined as a force majeure event, just as should any delays caused by the permitting processes of other agencies.

X. **SECTION XVIII: Stipulated Penalties.**

- Stipulated Penalty Amounts - Work (¶ 57): The amounts of stipulated penalties specified in the Template AOC are inconsistent with and significantly higher than other EPA removal action AOCs. As a preliminary matter, we therefore have proposed more reasonable sums.
- Stipulated Penalty Amounts - Reports (¶ 58): What does or does not constitute an "adequate report" is unclear and accords too much discretion to EPA. It therefore should be deleted as a vague and ambiguous term.

XI. **SECTION XIX: Covenant Not To Sue By EPA.**

- No "Reopeners": During our last meeting with EPA, EPA agreed to include a "no reopener" provision; this would appear to be the appropriate place to include it and we therefore have proposed some language.

XII. **SECTION XX: Reservation Of Rights By EPA.**

- In light of EPA's commitment to include No Reopeners, the last three subparagraphs in ¶ 68 should be deleted.

XIII. **SECTION XXII: Other Claims.**

- ¶¶ 74 and 75 are inappropriate and should be deleted.

XIV. **XXIII: Contribution.**

- We've proposed new language that clarifies the scope of the contribution protection to be provided, particularly in light of the *Atlantic Research* decision.

XV. **XXIV: Indemnification.**

- We've proposed a new paragraph (§ 78) regarding an indemnity by the United States in an effort to make EPA's "No Reopeners" commitment meaningful.

XVI. **SECTION XXV: Insurance.**

- The insurance provision in the Template AOC is inconsistent with other removal action AOCs with EPA and therefore should be omitted. It is particularly appropriate to do so here in view of the current financial crisis and the fact that policies may no longer be available from major insurance carriers such as AIG.

XVII. **SECTION XXVI: Financial Assurance.**

- The appropriate amount of financial assurance cannot be negotiated until the work to be performed has been determined, and we therefore do not propose a specific amount at this time. However, we can state at this preliminary stage that any AOC at this site should include greater flexibility in the means for providing financial assurances than those included in the Template AOC.

XVIII. **SECTION XXVII: Modifications.**

- The Template AOC provides for unilateral modification by EPA to any plan or schedule or to the Work Plan for the Site. We propose to delete this language, as it is inconsistent with other EPA removal action AOCs and is inappropriate for this Site and the parties likely to be included as Respondent(s).

XIX. **SECTION XXVIII: Notice of Completion of Work.**

- This section of the Template AOC could be read to give EPA a blank check to add new work at a later date, which would constitute a loophole that would render EPA's No Reopeners commitment without meaning. We therefore propose to delete this language as inconsistent with other EPA removal action AOCs and inappropriate for this Site and the parties likely to be included as Respondent(s).

We appreciate EPA's efforts to advance this matter by providing us with the Template AOC, and we look forward to discussing these comments with EPA at an appropriate juncture.